BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996.

Docket No. RT-00000F-02-0271

RUCO'S COMMENTS ON QWEST'S SUBMISSIONS

By Procedural Order dated May 20, 2002, the Hearing Division of the Arizona Corporation Commission ("Commission") set an amended schedule in the above matter. In relevant part, that schedule provided that interested parties shall file Comments to Qwest's previous submissions on or before May 24, 2002. Accordingly, the Residential Utility Consumer Office ("RUCO") submits the following comments.

RUCO has reviewed the agreements ("Agreements") provided by Qwest. Section 252 governs the Agreements, notwithstanding Qwest's arguments to the contrary.

Qwest argues that Section 252 requires Commission approval only for "core matters of price". Several of the Agreements clearly impact such core matters of price. See for example Confidential Exhibit A.

The plain language of Exhibit A relates to billing, a material item. Many other modifications and/or changes were being made to the original filed interconnection agreements.

Moreover, Qwest appears to be giving certain CLECs preferential treatment, in exchange for not opposing various applications submitted by Qwest before the Commission. For example, in his letter of November 15, 2000, incorporating the terms of an Agreement

under consideration between Qwest and Eschelon Telecom, Inc., Greg Casey, Executive Vice President of Wholesale Markets for Qwest writes:

> During development of the Plan, and thereafter, if an agreed upon Plan is in place by April 30, 2001, Eschelon agrees to not oppose Qwest's efforts regarding Section 271 approval or to file complaints before any regulatory body concerning issues arising out of the Parties' Interconnection Agreements.

Another example, found throughout many of the Agreements is a CLEC's promise to withdrawal from Qwest's merger docket with US West in exchange for some type of favorable treatment. Equally troubling, and no less important, are the Confidentiality clauses that seem to be a mainstay of most of the Agreements. The parties agree to keep the substance of the Agreements from the Commission unless permitted by the prior written consent of the other party. A truthful statement to the ACC could thereby become actionable as a breach of contract.

The above examples show why this docket cannot be expeditiously resolved. Qwest was cutting secret deals with various CLECs to avoid their input into the Merger and 271 dockets. Other dockets may be involved, and this Commission should fully investigate them. Moreover, the Commission must know the full impact of the Agreements on the 271 process prior to making its recommendation to the FCC.

Congress intended the Federal Communications Commission ("FCC") to perform its traditionally broad public interest analysis of whether a proposed action would further the purposes of the Act. *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271*, CC Docket No. 97-137, Memorandum and Order, August 19, 1997, ¶ 385. Indeed, the Supreme Court has rejected a "cramping" construction of the public interest requirement in favor of an "expansive" one that includes "standards for judgment adequately related in their application to the problem to be solved." *National Broadcasting Co. v. United States*, 319 U.S. 190. 217-20 (1943).

On December 28, 2001, the U.S. Court of Appeals for the District of Columbia issued its decision in *Sprint Communications Co. L.P. v. Federal Communications Comm'n*, 274 F.3d 549 (D.C. Cir. 2001) ("*Sprint*"). According to the Court, the FCC, in considering SBC's section 271 applications in Kansas and Oklahoma, erroneously gave the public interest argument of opposing parties "rather a brush-off." *Id.* at 554. Specifically, on "a statute that proclaims competition as the Congressional purpose," the Court held, the public interest may weigh heavily toward addressing a problem that bears directly and materially upon attainment of Congressional purpose. *Id.* at 554-55.

The Agreements suggest that the meager local competition that has developed to date in Arizona, or some of it, may not be the independent or unfettered competition toward which the Act strives. Instead, it may be the product of collusive or otherwise coordinated interdependent conduct, which is generally thought to be likely to occur in highly concentrated markets. *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 715-16 (D.C. Cir. 2001). The true intent of the secret Agreements bear directly and materially upon attainment of Congressional purpose. If they are collusive or favor certain CLECs, they further undercut Qwest's claim that granting section 271 authority at this time is in the public interest[1].

CONCLUSION

RUCO believes that the Agreements are subject to Section 252 and should have been submitted, by law, to this Commission for approval. Further, RUCO believes, subject to further investigation, that the Agreements were made with the result of preferential treatment to certain CLECs. RUCO recommends that this Commission not act on Qwest's 271 application until this matter has been investigated and the full impact on the public interest is known.

[1] Certain points raised in these comments were taken from the Office of the Consumer Advocate in Iowa in its 271 docket.

RUCO requests that the current procedural schedule be extended to allow for additional discovery, including depositions, and that a hearing be scheduled.

RESPECTFULLY SUBMITTED this 24th day of May, 2002.

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EXHIBIT A

(confidential material redacted)